



# Master Software and Service Agreement

IN CONSIDERATION OF THE MUTUAL PROMISES AND COVENANTS SET FORTH HEREIN, NEON RAIN AND CLIENT AGREE TO BE BOUND BY THIS AGREEMENT AND ATTACHMENTS HERETO.

## 1. Term/Renewal

The initial term of this Agreement ("Initial Term") shall be one (1) year beginning the date this Agreement is accepted by Neon Rain (the "Effective Date"). After the Initial Term, unless otherwise agreed to by the parties, this Agreement shall automatically renew for successive terms of equal length as the Initial Term. Client has 30 days prior to the expiration of the Initial Term to notify Neon Rain in writing of Client's desire to terminate service with no termination. During any renewal, all terms and conditions of this Agreement shall remain in full force and effect. The Initial Term plus all successive renewal periods shall be collectively referred to as the "Term". Pricing for each renewal Term shall be at Neon Rain's then current pricing.

## 2. Payments and Invoicing

Client agrees to pay all recurring and non-recurring charges and fees specified in the Agreement. Payment in U.S. currency shall be due within fifteen (15) days of an invoice being sent by Neon Rain. Some recurring services may not be invoiced and are still due within fifteen (15) days of the beginning of the month the Service is performed.

Services and/or Product scope and fees will be outlined in documents referenced under "Services, Products, and Fee Schedule" in Section 8.

In the event that any amount due Neon Rain remains unpaid fifteen (15) days after presentation of an invoice to Client, Neon Rain, in its sole discretion, may immediately terminate this Agreement in accordance with the provisions of Section 3 and/or withhold or suspend Services. Suspension of Service does not necessarily imply termination of this Agreement and service charges will continue to accrue as if no suspension had occurred. Reinstatement of a suspended or terminated Service requires a minimum of \$200.00 as a reinstatement fee in addition to any finance charges on the amount overdue.

All taxes, fees and governmental charges relating to the Services or Products provided hereunder (other than income taxes of Neon Rain) shall be paid by Client.

Accounts not paid within terms are subject to a 2% monthly finance charge.

Checks returned unpaid (NSF) are assessed a \$200.00 charge.

Amounts paid, including but not limited to, Initial Payments or Deposits are non-refundable.

## 3. Allowances for Service Interruptions (Web Hosting)

Client may be entitled to credits for Service interruptions. Any claim for credit must be submitted in writing by the Client to Neon Rain within ten business days of the event which caused the interruption.

If the accumulated interruption within any seven (7) day period equals or exceeds forty-eight (48) hours, Client shall receive a credit equal to the pro-rated charges for 1 week's web hosting service and may terminate the web hosting portion of this Agreement with no additional penalty except payment of any due invoices.



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Client shall not receive credit if an interruption is

- (i) caused by the negligence or willful misconduct of Client or others authorized by Client to use the services provided by Neon Rain;
- (ii) due to failure of power, or any problem of any type occurring at the Clients side;
- (iii) a result of scheduled maintenance, or
- (iv) due to any cause beyond Neon Rain's control.

### 4. Termination

Client may terminate this Agreement before expiration of the Term only if the following conditions are satisfied:

- (i) Client provides 30 days written notice to Neon Rain of its intent to terminate; and
- (ii) Client pays Neon Rain in full for all Services and Products, whether delivered to the Client or not, and
- (iii) Client pays an early termination fee equal to 50% of all remaining Services and Products to be delivered to Client during the Term of this Agreement.

Neon Rain may terminate this Agreement as follows:

- (i) Neon Rain may terminate, without cause, by giving Client 15 days prior notice; any service not performed by Neon Rain shall be credited to Client, or
- (ii) Neon Rain may terminate, at any time, upon 5 days prior notice if, in the sole judgment of Neon Rain, Client breaches any material provision of this Agreement and has not cured same by the end of the 5 days; or
- (iii) Neon Rain may terminate at any time in the event of nonpayment by Client.

### 5. Warranties and Limitation of Liability

The parties agree that, in respect of information, products, services, and computer programs provided by Neon Rain under this Agreement, except as expressly stated herein, Neon Rain MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE PRODUCTS OR SERVICES, OR THEIR CONDITION, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR USE BY ANY CUSTOMER. Neon Rain FURNISHES THE WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT ARE "AS IS" WITH ALL FAULTS, AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH THE USER OF SUCH INFORMATION OR PRODUCT OR SERVICE.

Neon Rain shall not be liable for claims or damages caused by Client's fault, negligence or failure to perform Client's responsibilities; claims against Client by any third party; or any act or omission of any other party furnishing products or services to Client.

Liability of Neon Rain under this Agreement shall be limited to the value of any fees paid by Client to Neon Rain under this Agreement. Under no circumstances shall Neon Rain be liable for lost profits or any incidental, special, punitive, exemplary, or consequential damages even if Neon Rain has been advised of the possibility of such damages. For any claim, Client's damages, if any, shall be limited to those proven as directly attributable to Neon Rain. Neither party shall be required to indemnify except as required by the express terms of this Agreement.

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### 6. Proprietary Rights, Ownership, and Information Protection

So long as Client's balance owed, including but not limited to invoices and termination fees, is paid in full, Client shall own all right, title, and interest in the content, layout, and pictures of any Product developed by Neon Rain exclusively for Client where such Product does not use or reference any property, trade secret, or proprietary information owned or used by Neon Rain before the date of this Agreement. Accordingly, upon satisfaction of the prior condition, Neon Rain hereby grants, conveys and assigns to Client all copyrights, trade secrets, patents and other intellectual property rights in such Product and all originals and copies of any such Product shall be provided to Client upon Client's request or the termination or expiration of this Agreement.

For any Product or Service created and/or delivered under this Agreement that does use or reference any property, trade secret, or proprietary information owned or used by Neon Rain, ownership shall be allocated as follows:

- (i) Neon Rain shall retain all right, title and interest in the developer tools and applications, including but not limited to strategy documents, used or supplied by Neon Rain in connection with developing and delivering any Product or Service.
- (ii) For all versions of Neon Rain's Content Management System, Neon Rain hereby grants to Client a personal, non-assignable, nontransferable, nonexclusive object code license to use such software solely for Client's internal business purposes in the United States for the Term of this Agreement.
- (iii) Neon Rain shall retain all right, title and interest in any framework for any software created under this Agreement. "Framework" means any property used by Neon Rain to develop or create software or websites or Product or Service or any other item for Client under this Agreement where such property used by Neon Rain existed prior to the date of this Agreement or was developed for future use by Neon Rain. Client shall own all right, title and interest in the end product. "End Product" and "Product" mean the property created above and beyond the Framework. Neon Rain grants to Client a perpetual, personal, non-assignable, nontransferable, nonexclusive object code license to use such Framework solely for Client's use of the End Product for its internal business purposes in the United States.
- (iv) Neon Rain shall retain all right, title and interest in any processes developed or used by Neon Rain where such property used by Neon Rain existed prior to the date of this Agreement.
- (v) Where Client utilizes processes, code, programming, or software in connection with the Service that is licensed to Neon Rain or to Client by a third party; Client shall adhere to the terms and conditions of the Vendor's license agreement pertaining to each such software program.

Client recognizes that the Services, Framework, processes, programming, and software used hereunder constitute valuable trade secrets of Neon Rain. Client shall use its best efforts to protect and keep confidential all Neon Rain Services, Framework, processes, programming, and software used by it and, shall make no attempt to examine, copy, alter, "reverse-engineer," tamper with, or otherwise misuse such Services, Framework, processes, programming, and software.



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### **7. Insurance**

Each party shall be responsible for assessing its own need for any type of insurance, including property, casualty, and liability Insurance and shall obtain such insurance covering its risks as it sees fit.

### **8. Services, Products, and Fee Schedule**

The Products and/or Services being ordered and the Fee Schedule for those Products and/or Services are detailed in additional Order Sheets and/or Work Orders, and/or Change Orders. When an estimate is not requested but Service is requested, then Neon Rain is granted permission to continue with that request at an hourly rate.

### **9. Design Revisions**

Design Revisions are defined as alterations to existing art that do not exceed a change of over 20% to the existing art. Project estimates may include a stated amount of revisions; requests that require more than the stated amount of revisions will be billed hourly. Change orders will be delivered at Client's request. If the revisions are not the fault of Neon Rain an additional fee shall be charged. Neon Rain shall be given the first opportunity to make any revisions requested by Client. If Neon Rain objects to any revisions to be made by Client, Neon Rain shall have the right to have its name removed from the published materials.

### **10. Independent Contractor Status**

Neon Rain performs this Agreement as an independent contractor, not as an employee of Client. Nothing in this Agreement is intended to construe the existence of a partnership, joint venture, or agency relationship between Client and Neon Rain. Client understands Neon Rain is not providing services exclusively to the Client and Neon Rain has the right to perform services for other clients during the term of the Agreement.

### **11. Client Non-Response or Delay**

It is mutually agreed that from time to time Neon Rain will need access to Client's personnel and resources to provide project direction and feedback. Should Neon Rain deem the client as non-responsive, Neon Rain will promptly inform the client in writing or email of such required feedback. Should client not respond within 5 days, Neon Rain shall promptly inform client that the Neon Rain project resources will be put on hold or reallocated to other Neon Rain clients until such time that client provides necessary access to personnel or resources and client promptly informs Neon Rain in writing to re-engage Neon Rain resources in the project. At that time, Neon Rain may schedule re-engagement of Services based on existing or expected workload, which may significantly delay delivery to Client. Neon Rain, at its sole discretion, may decide that a re-engagement fee is required to re-familiarize ourselves with the project.

### **12. Statute of Limitations**

In the event of an alleged breach of this Agreement, any claim or potential claim must be brought within two (2) years of the termination of this Agreement.

### **13. Notices**

Any notice pursuant to this Agreement shall be in writing and delivered to the mailing addresses and/or email address designated by the parties.

### **14. Non-solicitation of Neon Rain employees**

Client shall not solicit for hire and shall not hire any current Neon Rain employee without Neon Rain's consent in written form.



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### 15. Miscellaneous

Client shall not assign or transfer this Agreement in whole or in part without the prior written consent of Neon Rain, which shall not be unreasonably withheld. Any act or derogation of the foregoing shall be null and void; provided, however, that any such assignment shall not relieve the Client of its obligations under this Agreement. Neon Rain may assign this Agreement in whole or in part to an entity that:

- (i) it controls, is under common control with or is controlled by Neon Rain; or
- (ii) succeeds (whether by merger, reorganization, sale of assets or otherwise) to the business of Neon Rain.

Client agrees to allow, at no additional cost, Neon Rain a visible credit line on the bottom of the Web Site and/or allows Neon Rain to utilize Client's name, photo, and project in marketing and promotional materials.

Neither party shall be responsible for performance of its obligations hereunder where delayed or hindered by war, riots, embargoes, strikes or other occurrences beyond the party's control. Each party shall notify the other party in the event of any of the foregoing occurrences. Should such occurrence continue for more than sixty (60) days, the adversely affected party can cancel this Agreement for the affected Services with no further liability other than charges prorated to the date of such occurrence.

This Agreement and any Addendums shall be deemed to have been made in the State of Colorado and all aspects hereof shall be governed by the laws of Colorado. Any controversy or claim arising out of or directly or indirectly relating to this Agreement shall be submitted to the American Arbitration Association for binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The American Arbitration Association shall appoint a single non interested arbitrator within sixty (60) days after the notice of request for arbitration by either party. The decision of the arbitrator will be legally binding on all parties without recourse through a trial de novo or commencement of suit through the courts. This arbitration provision shall be deemed to be self-executing, and in the event either party fails to appear at any properly noticed arbitration proceeding, an award may be entered against such party notwithstanding said failure to appear. The arbitration shall take place in Denver, Colorado. The prevailing party in any dispute shall be entitled to recover its costs, including reasonable attorneys' fees, together with prejudgment interest at the rate of 18% per annum.

This Agreement, including any Exhibits or other documents specifically incorporated by reference, sets forth the entire agreement between Neon Rain and Client with respect to the subject matter hereof and supersedes all previous representations, understandings or agreements and shall prevail notwithstanding any variance with terms and conditions of any other prior writing between the parties. If any provision of this Agreement is held to be invalid by a court of competent jurisdiction, then the remaining provisions shall nevertheless continue in full force and effect. The waiver by either party hereto of any breach of the terms and conditions hereof will not be considered a modification of any provision, nor shall such a waiver act to bar the enforcement of the subsequent breach.

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